Supreme Court, U.S.
FILED

94 937 NOV 23 1994

No. OFFICE OF THE CLERK

In The
Supreme Court of the United States

October Term, 1994

MEREX A.G.,

Petitioner,

-against-

FAIRCHILD WESTON SYSTEMS, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DANIEL J. O'CALLAGHAN
17 Battery Place
New York, New York 10004
(212) 222-4200
Counsel of Record and
Attorney for Petitioner
Merex A.G.

44 pp

QUESTIONS PRESENTED

I.

Does not Congressional intent upon the language of FRCP Rules 16(e) and 39(c), together with Seventh Amendment right to jury trial, obligate not only the parties to the Final Pre-Trial Order ("**PTO**") - except "to prevent manifest injustice" - but also the district court?

II.

Was it constitutional mid-trial to rule a jury "advisory" upon a promissory estoppel claim in an "*action*" in which **all** issues and all claims had been (i) consented as triable by jury and (ii) "So Ordered" in the PTO filed 15 months prior to trial?

III.

Did not the PTO prescribe jury trial upon all claims including claims of promissory estoppel and intentional interference with Merex's business, such as had been consented to and "So Ordered" in the PTO and jury instructions, filed 15 months prior to trial, in trial memoranda filed 9 months prior to trial, and as asserted in (i) a summary judgment motion filed 6 years prior to trial and (ii) a Rule 37 motion filed 4 years prior to trial?

IV.

Does not "advisory jury" declaration, particularly mid-trial notwithstanding contrary PTO consented to and "So Ordered" issues, claims and jury trial rights, present a rationale which unfairly may address district court proceedings and rulings absent FRCP Rules 16(e) and 39(c) limitations?

V.

Should not Fairchild's FRCP Rule 50 motion have been denied grounded upon Merex's satisfaction of State law requirement to

preclude application of the New York Statute of Frauds and/or should not the General Verdict of the jury in favor of Merex have been sustained upon grounds of **quantum meruit**, quasi-contract and/or upon declaratory relief?

VI.

Did not the district court and magistrate-judge fail to direct appropriate FRCP Rules 37 and 56(g) relief in consequence of Fairchild's unauthorized redaction and non-production of writings evidencing express commission obligation to Merex?

VII.

Were not the pre-trial and trial proceedings conducted so unfairly and the district court Opinion so grounded upon manifest error of law and fact that Merex's post-trial request for FRCP Rules 50(b), 52(b) and 59 relief should have been granted?

VIII.

Is it not appropriate now to accept this Petition upon these Questions so that a fair and just determination may be provided to this Petitioner - in preference to review of these or similar Questions relating to "advisory jury" and FRCP Rules 16(e) and 39(c) conflict at a later time - so that this Petitioner may receive the benefit from Constitutional preeminence now declared to FRCP Rules 16(e) and 39(c) requirement for PTO determination of jury trial rights - "absent manifest injustice" - in place and stead of district court "advisory jury" mid-trial discretion?

PARTIES

The names of all the parties to the proceeding in the Court whose judgment is sought to be reviewed are as follow: Merex A.G. ("**Merex**")[1], Peter C. Lachmann ("**Lachmann**"), and Fairchild Weston Systems, Inc. ("**Fairchild**").[2]

---

[1]Merex A.G. does not have a parent or subsidiary relationship with another company. Merex A.G. was affiliated through stock ownership with plaintiff Merex Corporation.

[2]By motion dated February 9, 1994, pursuant to FRCP Rule 58, Lachmann requested *vacatur* of his trial settlement agreement with Fairchild. By order dated May 30, 1994, the District Court denied the motion. Lachmann has taken an appeal to the United States Court of Appeals for the Second Circuit by notice of appeal dated June 23, 1994, which appeal is *sub judice*.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES x

OPINIONS AND ORDERS BELOW 1

JURISDICTION 2

STATUTORY AND RULE PROVISIONS INVOLVED . . 2

STATEMENT OF THE CASE 2
- A. Jurisdiction of the District Court 2
- B. Nature of Case, Course of Proceedings, Disposition Below 3
- C. Statement of Facts 11

REASONS FOR GRANTING THE WRIT 22
- A. Jury Was Not Advisory: General Verdict Should Be Reinstated 22
- B. The Verdict Upon Promissory Estoppel Was Valid 24
- C. The PTO "[C]ontrolled...modified only to prevent manifest injustice", FRCP Rule 16(e); Preclusion of Tortious Interference Claims Was Error 26
- D. Fairchild's Rule 50 Motion Should Have Been Denied 27
- E. New Trial 28
- F. Rules 37 and 56(g) Relief Should Have Been Granted 29

CONCLUSION 30

APPENDIX A - OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, DATED DECEMBER 29, 1992 . . . . . 1a

APPENDIX B - ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DENYING PLAINTIFFS' MOTION FOR JUDGMENT AS A MATTER OF LAW, TO AMEND THE JUDGMENT, AND FOR A NEW TRIAL, DATED OCTOBER 29, 1993 . . . . . 37a

APPENDIX C - DECISION OF UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AFFIRMING JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED JULY 14, 1994 . . . . . 42a

APPENDIX D - ORDER OF UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK ENDORSED UPON LETTER FROM COUNSEL FOR MEREX A.G., MEREX CORPORATION AND PETER C. LACHMANN TO THE UNITED STATES DISTRICT COURT, FOR THE SOUTHERN DISTRICT OF NEW YORK DATED APRIL 2, 1986 . . . . . 54a

APPENDIX E - MEMORANDUM AND ORDER OF UNITED STATES MAGISTRATE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED MAY 18, 1989 . . . . . 57a

APPENDIX F - ORDER OF UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DENYING PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING EN BANC
DATED SEPTEMBER 8, 1994 . . . . . 62a

APPENDIX G - ORDER AND JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
DISMISSING ACTION
DATED JANUARY 21, 1993 . . . . . 64a

APPENDIX H - PLAINTIFFS' REQUEST FOR
28 U.S.C. §636 RECONSIDERATION,
DATED JUNE 2, 1989 . . . . . 65a

APPENDIX I - TRANSCRIPT OF CONFERENCE BEFORE
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK,
DATED DECEMBER 13, 1989 . . . . . 80a

APPENDIX J - N.Y. GEN. OBLIG. LAW §5-701(a)(10)
(THE "STATUTE OF FRAUDS" OR THE "STATUTE") 110a

APPENDIX K - 28 U.S.C., CODE OF
FEDERAL REGULATIONS,
"INTERNATIONAL TRAFFIC IN ARMS,"
PARTS 127, 130 ("ITAR") 111a

APPENDIX L - FRCP RULE 16(e) 117a

APPENDIX M - FRCP RULE 39 . . . . . 117a

APPENDIX N - FRCP RULE 56(g) 118a

APPENDIX O - TRIAL EXHIBITS
MEREX'S EXHIBIT 27
MEMORANDUM TO MR. MERTINS, SR.,
DATED AUGUST 24, 1982 . . . . . 119a

APPENDIX O - MEREX'S EXHIBIT 163
HANDWRITTEN LETTER OF INTENT,

ADDRESSED TO UNITED STATES
DEPARTMENT OF STATE,
MUNITIONS CONTROL BUREAU
FROM PEOPLES REPUBLIC OF CHINA . . . 120a

APPENDIX O - MEREX'S EXHIBIT 164
LETTER FROM ZHAO FEI OF
CHINA NORTH INDUSTRIES CORPORATION (NORINCO)
TO MR. ROBERT NEASHAM,
DATED NOVEMBER 19, 1982 . . . . . 121a

APPENDIX O - MEREX'S EXHIBIT 503
LETTER FROM C. REDANZ OF FAIRCHILD TO
OFFICE OF MUNITIONS CONTROL
DATED DECEMBER 10, 1982 . . . . . 123a

APPENDIX O - MEREX'S EXHIBIT 83
TELEX FROM
STEVE WAHL TO MR. CHRIS A. LAY,
AT BEIJING HOTEL, BEIJING, CHINA,
DATED APRIL 4, 1984 . . . . . 127a

APPENDIX O - MEREX'S EXHIBIT
FAIRCHILD INTERNAL MEMORANDUM
FROM C. REDANZ TO C.A. LAY,
DATED APRIL 6, 1984 . . . . . 129a

APPENDIX O - MEREX'S EXHIBIT 83(a)
TELEX FROM CHRIS LAY/A. ARENA OF
FAIRCHILD TO
ZHAO FEI OF NORINCO,
DATED MAY 14, 1984 . . . . . 130a

APPENDIX O - MEREX'S EXHIBIT
EXCERPTS FROM CONTRACT BETWEEN
FAIRCHILD AND POLY TECHNOLOGIES AND NORINCO,
DATED AUGUST 27, - SEPTEMBER, 1984 . . 131a

APPENDIX O - MEREX'S EXHIBIT 300
LETTER FROM FAIRCHILD TO

OFFICE OF MUNITIONS CONTROL
UNITED STATES DEPARTMENT OF STATE,
DATED, OCTOBER 12, 1984 . . . . . 133a

APPENDIX O - MEREX EXHIBIT 001-A
FAIRCHILD PROGRAM BUDGET RELEASE,
DATED OCTOBER 22, 1984 . . . . . 136a

APPENDIX P - EXCERPT FROM
TRANSCRIPT OF DEPOSITION OF
FAIRCHILD BY THOMAS EGAN,
DATED DECEMBER 20, 1988 . . . . . 137a

APPENDIX Q - FAIRCHILD PRICING FILES,
EXCERPT, APRIL 4, 1984 . . . . . 139a

APPENDIX Q
EXCERPT, APRIL 4-5, 1984 . . . . . 140a

APPENDIX Q
EXCERPT, APRIL 9, 1984 . . . . . 141a

APPENDIX Q
EXCERPT, APRIL 10-11, 1984 . . . . . 142a

APPENDIX Q
EXCERPT, APRIL 10-11, 1984 . . . . . 143a

APPENDIX Q
EXCERPT, APRIL 24, 1984 . . . . . 144a

APPENDIX Q
EXCERPT, MAY 17, 1984 . . . . . 145a

APPENDIX Q
EXCERPT, MAY 22, 1984 . . . . . 146a

APPENDIX Q
EXCERPT, SEPTEMBER 12, 1984 . . . . . 147a

APPENDIX Q
EXCERPT, [SEPTEMBER, 1984] 147a

APPENDIX R - TRANSCRIPT EXCERPT
APRIL, 1992 TRIAL,
(MERTINS, SR.'S ILLNESS) 148a

APPENDIX S - TRANSCRIPT EXCERPT,
APRIL, 1992, TRIAL,
(MEREX REBUTTAL) 150a

* * * * *

TABLE OF AUTHORITIES

Page

CASES

AMF Tuboscope, Inc. v. Cunningham,
352 F.2d 150 (10th Cir. 1965) 23

Arcadian Phosphates, Inc. v. Arcadian Corp., 884 F.2d 69 (2nd Cir. 1989) 28

Bereda v. Pickering Creek Indus. Park, Inc., 865 F.2d 49 (3d Cir. 1989) 23, 30

Carey v. Bahama Cruise Lines, 864 F.2d 201 (1st Cir. 1988) 28

Crabtree v. Elizabeth Arden Sales Corp., 305 N.Y. 48 (Ct. App. 1953) 27

DeGioia v. United States Lines Company, 304 F.2d 421 (2nd Cir. 1962) 24, 30

Esquire Radio & Electronics, Inc. v. Montgomery Ward & Co., Inc., 804 F.2d 787 (2nd Cir. 1986) 24, 25

Hildebrand v. Bd of Trustees of Mich. S. Univ., 607 F.2d 705 (6th Cir. 1979) 23, 30

Lamborn v. Dittmer, 873 F.2d 522 (2nd Cir. 1989) 26

Litton Systems, Inc. v. American Tel. & Tel. Co., 700 F.2d 785 (2nd Cir. 1983) 18

Loinaz v. EG&G, Inc., 910 F.2d 1 (1st Cir. 1990) 28

Marcella v. ARP Films, Inc., 778 F.2d 112 (2nd Cir. 1985) 27

Marilyn Miglin, Inc. v. Gottex Industries, Inc., 790 F.Supp. 1245 (S.D.N.Y. 1992) 25

Merex A.G. v. Fairchild Weston Systems, Inc., 29 F.3d 821 (2nd Cir. 1994) 1

Merex A.G. v. Fairchild Weston Systems, Inc., 810 F.Supp. 1356 (S.D.N.Y. 1993) 1

Morris Cohon & Company v. Russel, 23 N.Y. 2d 569, 297 N.Y.S. 2d 947 (Ct. App. 1969) 27

Nimrod Mktg. (Overseas) Ltd. v. Texas Energy Inv. Corp., 769 F.2d 1076 (5th Cir. 1985) 28

Ohanian v. Avis Rent A Car System, Inc., 779 F.2d 101 (2nd Cir.1985) 27

Palandjian v. Pahlavi, 614 F.Supp. 1569 (D. Mass. 1985), *appeal denied*, 782 F.2d 313 (1st Cir. 1986) 28

Paper Corp. of the United States v. Schoeller Tech. Papers, 807 F.Supp. 337 (S.D.N.Y. 1992) 27

Philo Smith & Co. v. USLIFE Corp., 554 F.2d 34 (2nd Cir. 1977) 25

Pradier v. Elespuru, 641 F.2d 808 (9th Cir. 1981) 23

Sussex Leasing v. U.S. West Financial Services, 877 F.2d 200 (2nd Cir. 1989) 27

Thompson v. Parkes, 963 F.2d 885 (6th Cir. 1992) 23, 30

United States v. Hougham, 364 U.S. 310, 81 S.Ct. 13, 5 L.Ed.2d 8 (1960) 26

STATUTES:

United States

28 U.S.C. §1254(1) 2

28 U.S.C. §1332. 2

United States Constitution Seventh Amendment . . i, 22, 23, 26

New York State

N.Y. Gen. Oblig. Law §5-701(a)(10)
(McKinney 1989) (the "**Statute of Frauds**") . ii, 2, 4, 6, 9, 24, 25, 27

RULES

Federal Rules of Civil Procedure:

11 3
16 26
16(e) . . . . . i, ii, 2, 6, 22, 24, 26, 30
26 . . . . . 1, 4, 5, 30
32(b) 28
37 . . . . . i, ii, 5, 22, 26, 29, 30
38(b) 24
38(d) 24
39(a) 24
39(c) . . . . . i, ii, 2, 6, 22, 23, 26, 30
50 . . . . . i, 9-11, 27, 29
50(b) . . . . . ii, 1, 2
52 11
52(b) . . . . . ii, 1, 2
56(g) . . . . . ii, 2, 11, 29
58 iii

59 . . . . . ii, 1, 2, 11

Federal Rules of Evidence:
801(d)(2)(D) 18

Other United States Rules:

28 U.S.C. 22, Code of Federal Regulations,
"International Traffic in Arms" 2, 10, 12, 14, 17

OTHER AUTHORITIES

5 James Wm. Moore, *et al.*, *Moore's Federal Practice*
¶ 39.11 (2d ed. 1993) 6

Wright, Miller, Cooper & Gressman, *Federal*
Practice and Procedure, Vol 9, §2333 (1977) 6

* * * * *

In The

Supreme Court of the United States

October Term, 1994

MEREX A.G.,
Petitioner,

v.

FAIRCHILD WESTON SYSTEMS, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS AND ORDERS BELOW

The opinion of the District Court officially is reported as *Merex A.G. v. Fairchild Weston Systems, Inc.*, 810 F.Supp. 1356 (S.D.N.Y. 1993) and appears in Appendix ("**App**") A at 1a. The Order of the District Court which denied Merex's motion for FRCP Rules 50(b), 52(b), and 59 relief officially is not reported and appears in App B at 37a. The United States Court of Appeals for the Second Circuit affirmed by Opinion and Order which officially is reported as *Merex A.G. v. Fairchild Weston Systems, Inc.*, 29 F.3d 821 (2nd Cir. 1994) and appears in App C at 42a. The order of the United States Court of Appeals for the Second Circuit denying the petition for rehearing *en banc* appears in App F at 62a. The Order of the District Court which directed Fairchild to "produce *all* relevant files...Rule 26" (the "**Rule 26 Order**"), officially is not reported and appears in App D at 54a. The Memorandum and Order of the United States Magistrate-Judge

which determined that the Rule 26 Order was "unenforceab[le]...due to the inevitable uncertainty of its meaning" officially is not reported and appears in App E at 57a. The Order and Judgment of the United States District Court dismissing the action appears in App G at 64a.

JURISDICTION

The judgment of the United States District Court for the Southern District of New York was entered on January 28, 1993. A timely motion pursuant to FRCP Rules 50(b), 52(b) and 59 was denied by order entered November 8, 1993. An appeal to the United States Court of Appeals for the Second Circuit was denied by Opinion and Order dated July 14, 1994. A timely petition for rehearing *en banc* was filed July 28, 1994, and thereafter was denied on September 8, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY AND RULE PROVISIONS INVOLVED

As outlined in the Appendices, the following provisions are involved: FRCP Rules 39(c), 16(e), 56(g), the New York Gen. Oblig. Law §5-701(a)(10) (the "Statute of Frauds" or the "**Statute**"), and 28 U.S.C. 22, Code of Federal Regulations, "International Traffic in Arms, " Parts 127, 130 ("**ITAR**").

STATEMENT OF THE CASE

A. Jurisdiction of the District Court

Subject matter jurisdiction in the United States District Court was grounded upon diversity of citizenship. 28 U.S.C. §1332. Petitioner Merex A.G. ("**Merex**") was alleged to be a corporation or other entity organized and existing pursuant to the laws of the Federal Republic of (West) Germany. Petitioner Merex Corporation ("**Merex Corp.**") was alleged to be a corporation or other entity organized and existing pursuant to the laws of the State of Virginia. Petitioner Peter C. Lachmann ("**Lachmann**") was alleged to be a citizen and national of the Federal Republic of (West) Germany. Respondent, Fairchild Weston Systems, Inc.

("**Fairchild**") was alleged to be a corporation organized and existing pursuant to the laws of the State of Delaware.

B. Nature of Case, Course of Proceedings, Disposition Below

The action commenced on August 21, 1985, alleged claims against Fairchild for an 8% commission for Merex and a 6% commission for Lachmann measured against the $20.3M sale price of two (2) reconnaissance (a/k/a "**LORAP**") cameras sold by Fairchild to the People's Republic of China ("**PRC**") in September, 1984 ("**Project Anna**"). At the first substantive conference held before the court (January 21, 1986), the court directed that Fairchild move for summary judgment and R. 11 sanctions:

> THE COURT: ***[I] am not going to spend more than five more minutes on this case***.... The only question is, was there an agreement to pay Merex commissions? ***Now, show it to me, and that's the end of that.... They could work ever so hard; in the absence of a contract it doesn't amount to a thing***... [I] will receive... closing briefs,... if I find that your case has no merit...I will award...sanctions. (A 162a,b).

The Court limited discovery to 60 days. During this time, Fairchild ***secreted*** the existence of key witnesses and writings, particularly secreting Fairchild's Controller, T. Egan ("**Egan**") and Asst. Controller, C. Fanneron ("**Fanneron**"), and their pricing files ("**Pricing Files**"), writings which confirmed commission obligation to Merex (and Lachmann). These writings were ***not*** "compiled by scientists, cost accountants, etc." (App A at 21a, 22a), rather exclusively are in the hands of Egan and Fanneron, written during meetings with Fairchild's President, L.H. Pighi ("**Pighi**" or "**LHP**"), and Sr. Vice-President for the project, C. Lay ("**Lay**"), and *solely* concern the pricing, including the *commissions* for *this sale*. (App Q at 139, **et seq.**). Initially, however, none of the Pricing Files were identified, nor were Egan, Fanneron or Kraljic ("**Kraljic**"), the project's Contract Administrator, rather, Fairchild representing: "[L ay, Neasham

and Pighi are the only people...who may have knowledge...." (A 165, etc.).

Thereafter, Merex commenced upon depositions of the identified witnesses, none of whom represented knowledge concerning "writings" obliging Fairchild to "commissions", documents, nonetheless, then in existence, however, secreted together with identity of author. Notwithstanding improper prompting by S. Wahl, Fairchild's General Counsel, key dispute participant and witness throughout the nearly three (3) week jury trial ("**Wahl**"), on the 56th day of the 60-day authorized discovery, Kraljic and Egan revealed the secreted documents. The court directed that Fairchild "[P]roduce *all* relevant files...Rule 26,..." (the "**Rule 26 Order**"). (App D at 54a). *Prior to such production*, however, in March, 1986, Fairchild presented a motion for summary judgment, including request for $181,000 sanctions against Merex's counsel (the "**Sum. J. Motion**") grounded upon the Statute of Frauds (N.Y. Gen. Oblig. Law §5-701(a)(10) (McKinney 1989) (the "**Statute**"). Thereupon, without authorization, Fairchild redacted the documents which were produced and did not produce others until after denial of the Sum. J. Motion *2½ years later*. Notably, *not produced* until that time was Egan's ***early-April, 1984***, memorandum to: "***Commission - cut-out***", as Fairchild's price to the PRC was being reduced, the format changing from sale/resale to direct sale.[1] (App P at 138a).

---

[1]In 1986, at Egan's first deposition, Egan testified that there were "no records" of Pricing Files and that Egan had "no recollection" of any such writings - e.g., his own and Fanneron's 123 pages of notes for the $20M-55M sale of military equipment to the PRC. Nonetheless, Egan admitted that **Ex 107** stated Fairchild's intent to pay an "*8% commission*":

> "Anna.
> Current agreement with Merex.
> We quoted $52 mill to Merex.
> Merex quoted 54 mill.
> We will accept $50 million & Merex gets the differential of $4.0 million or *8% commission...*" (Emphasis added.)

Explicit in the Pricing Files is Fairchild's recognition that Merex was to be compensated on a commission basis; indeed, in Fairchild's ***sale/resale computations and post-April 6, 1984, direct sale computations, consistently***

In consequence of Fairchild's failure to produce Fanneron in December, 1988, Merex sought his deposition by seven (7) page motion (the "**Rule 37 Motion**"). Fairchild responded with an unauthorized, voluminous exhibit, cross-motion which attempted to rationalize Fairchild's unauthorized redaction and non-production of the secreted writings (and witnesses). In May, 1989, a Magistrate-Judge authorized the deposition, however, directed to be completed in one (1) day, notwithstanding that since commencement of the action in 1985 - i.e., four (4) years earlier - Merex had **been limited to sixty (60)** days of discovery, and notwithstanding that 123 pages of detailed Fanneron and Egan 1982-84 handwritten notations recording voluminous "commission" assurances to Merex were to be reviewed, ruling that the Rule 26 Order was "*[u]nenforceab[le] due to the inevitable uncertainty of its meaning*". (App E at 59a). Merex sought reconsideration. (App H at 65a). Six (6) months later, on December 13, 1989, at a conference, the court denied reconsideration, "[f]or different reasons which I don't have to again recite..." (App I at 109a). Earlier, the court had identified erroneous reasons. (**E.g.**, App I at 97-99).

Regrettably, the conference transcript evidences the court's continuing absence of interest in the merits of Merex's suit and absence of significance to the secreted writings, including Egan's "***Commission - cut out***" admission, viz., evidence which in denial of all fair trial 2½ years later, *inter alia*, upon clearly erroneous rulings for failure in subpoena service, the court held inadmissible. This conference was the last time counsel appeared before the court prior to trial, i.e., *2½ years later*, notwithstanding repeated requests by Merex for a conference.[2] Unfairly, the "advisory

---

Fairchild included Merex's commission in computing the price. On Ex 107, Egan, twice had written the word "Commission", but contended that he wrote the word mistakenly both times, on the same page, at the same time. Kraljic, testified to Fairchild's intended usage of "commission": "L.H. Pighi is looking to reduce the ***total commission*** received by Merex and Lachmann to 13% combined." (Emphasis added.) (R. F'child Doc. #20052)

[2]Prior to the April, 1992, trial, other than a brief in-chambers meeting conducted a short time after commencement of the action in August, 1985, the court held only two (2) "conferences" in this action (January 21, 1986 and

jury" mid-trial declaration afforded reserve assurance for the court's December 21, 1986, commitment to dismissal upon the Statute, and January 21, 1989, commitment to denial to Merex of use of the secreted writings to demonstrate contract breach and "*unconscionability*", as well as evidence upon the tortious interference claims.[3]

At this conference, the court directed a *final* Pre-Trial Order submission (the "**PTO**"), together with proposed charge and **voir dire**. In January, 1990, the Magistrate-Judge ordered that upon completion of the Fanneron deposition, Merex was to submit a draft pre-trial order ("**Draft PTO**"). Merex complied, including a statement in the Draft PTO that upon the filing of the PTO that the pleadings be amended or so be deemed amended grounded upon tortious interference claims. (A 562-86). Upon completion of the directed depositions, Merex attempted to conclude the PTO: the effort consumed 9 months. In pertinent part, as consented by Fairchild and "**So Ordered**" by the court, the PTO states:

2. JURY -- NON-JURY:

December 21, 1989). Notwithstanding that counsel were not advised other than that a "conference" had been scheduled, upon commencement, the court directed that these "conferences" be transcribed.

[3]The ***Circuit's affirmance*** upon rationale for "advisory jury" - notwithstanding "a host of arguments on appeal..." (App C at 45a) - upon this record, one dismal in its unrelenting absence of fair proceedings to Merex, is inexplicable in context of language of restriction contained in R. 16(e) (and R. 39(c)), i.e., statutory conflict unmentioned in the affirmance. Notably, the Circuit's reliance upon 5 James Wm. Moore, *et al.*, *Moore's Federal Practice* ¶ 39.11 (2d ed. 1993), fails to reference Wright, Miller, Cooper & Gressman, *Federal Practice and Procedure*, Vol 9, §2333 (1977), which ***rejects "advisory jury"*** upon "So Ordered" "consent" to jury trial, as here occurred:

> Consent...need not be express. If one party demands a jury, the other parties do not object, and the court orders trial to a jury, this will be regarded as trial by consent [footnote omitted]. ...[T]he ***verdict has the same effect as if trial by jury had been a matter of right and cannot be treated as advisory only*** [footnote omitted]. *Id.*, Vol. 9, §2333 (1977).

Further, the Circuit was presented in July, 1994, with proceedings upon appeal which had been ***extraordinarily delayed*** since August, 1985, upon uniquely unfair, indeed, prejudicial summary judgment and discovery pre-trial abuses, thereafter, compounded by an unfair trial and protracted post-trial proceedings.

Plaintiffs have demanded a ***jury trial of all issues***. ***Fairchild accepts such demand***.

3. AMENDMENTS -- DISMISSALS:

A. Plaintiffs' Request to Amend

Plaintiffs seek to amend the Complaint or *by Court Order upon the submission of this Pre-Trial Order to have such pleading deemed amended*...supporting grounds of...intentional ...interference with Plaintiffs' ability to perform the commission agreements, which interference may be identified as either/both *intentional interference with prospective economic advantage claims*... [B]ased upon...improper interference with...commission rights by "cutting out"...commissions...thereafter secreting the key witnesses knowledgeable... T. Egan...[4] and C. Fanneron ...withholding documents and/or redacting documents without authorization in April, 1986, thereafter producing for the *first* time certain documents and Egan and

---

[4]The court is incorrect concerning ***Egan's "authority"*** to bind Fairchild to commission obligation. (App A at 22a). As Controller, Egan *had such authority* and exercised it upon this sale. See, Fairchild's Program Budget Release: commissions in the amount of $614.5K *required approval* of Egan, as Controller, for such sale "Over $1 million" (App O at 136a); see also, Egan *first* deposition: "Q. What was your (Egan) involvement in the project, if any? A. Supervising the pricing." R. 1069. The court precluded all use of the second (or continued) Egan deposition upon *Wahl's* contention of Egan's availability. (App S at 153a). In this deposition Egan admitted that at the *critical* time, i.e., March/April, 1984, as the price was being negotiated to the PRC, *absent Merex's presence or knowledge*, in Egan's hand-written words, at meetings with Pighi and Lay, Fairchild had **"Commission - Cut-out"**. Simply, if there were not a "commission" obligation extant, why, in computing a reduced price to the PRC, was it necessary for Fairchild's controller to document that the "commission" had been "cut-out;" why, if all is so obvious does not (i) a lengthy reported district court opinion and reported Circuit affirmance not include, or even remotely reference, these Egan *uncontested* words of admission, or reference the PTO tortious interference and promissory estoppel claims as consented to, indeed, "So ordered", for jury trial; (ii) why were such extremes necessary at trial so not to enforce the Egan and Fanneron (and Kraljic) trial subpoenas concerning these writings and (iii) why does the court represent review of "all of the offered" documents (App A at 22a), when the transcript records the court declined review of those printed in the Appendix at (App Q at 139a)?

> Fanneron deposition testimony in support of such amendment only after November, 1988. These events were not confirmed until after an improper motion for summary judgment had been presented in April, 1986, and denied in September/October, 1988... The claims for improper interference with contractual rights and prospective economic advantage are neither new nor unasserted claims, but rather substantively and effectively were presented in the Amended Complaint. ...[D]iscovery has occurred of the factual basis for these claims. Accordingly, Fairchild is not prejudiced....
>
> 8. **ISSUES OF LAW** - *Plaintiff's Points of Law*: * * *
> (e) Whether Fairchild may...tak[e]...over the project for itself and thereby depriv[e] ... Merex/Lachmann of compensation, particularly by having "**cut-out**" Merex/Lachmann from the sale and/or by intentional interference with contract and/or by intentional interference with prospective economic advantage. [Citations omitted.]

In January, 1991, the 45-page PTO was signed by the court, ordering presentation to the jury of all claims and defenses, including the tortious interference claims; concurrently comprehensive jury instructions were filed. (A 645-89). In July, 1991, lengthy trial memoranda were filed. **All** submissions identified the action as triable before a jury upon **all** claims and identified claims grounded upon tortious interference with economic advantage. Consistently, during the *2½ year interval* between the December, 1989, conference and the April, 1992, trial, Fairchild opposed Merex's frequent requests for a conference; consistently, the court and the Magistrate-Judge **declined to schedule any conference**. At trial, *the court precluded all admissibility - indeed, all reference - to the Pricing Files*:

> "This Court examined...*all* of the offered... documents and did not find a single one which states Fairchild was to pay Merex a commission on a direct sale...." (App A at 22a).

Nonetheless, the court did **not** so examine these materials. Simply, the court *declined to review more than a small portion of these writings*.[5]. Moreover, these documents *do so state* that Fairchild was to pay Merex (and Lachmann) ***commissions on a direct sale***. (See App Q at 139a, **et seq.**).[6] The court precluded fair cross-examination of *all* Fairchild witnesses, relied upon prejudicial Fairchild PRC-hearsay evidence, and precluded all examination concerning pricing, notwithstanding documented participation in pricing events by Pighi, Lay, and Egan, including "commissions", expressly recorded as payable to Merex **both during and subsequent to the sale/resale period**. (A 1377-93, etc.). The court granted in part Fairchild's Rule 50 motion dismissing the contract, quantum meruit and declaratory judgment claims upon Fairchild's defense of the Statute. (A 1315, *et seq.*). Thereafter, Lachmann accepted a settlement with Fairchild in the amount of $150,000. The court ruled that only Merex's promissory estoppel claim would be presented to the jury, thereupon, notwithstanding objection, declared "**advisory**". (A 1492, 1498).

In clear error, the court authorized Wahl to discredit his 1986 testimony concerning Ex 83. (App A at 14a). Wahl was a key participant to the *unauthorized*, March/April, 1984 direct Fairchild/PRC negotiations, indeed, the author of **Ex 83**, the ***April***

---

[5]The court denied admissability notwithstanding ***direct*** Fairchild commission obligation to Merex (and Lachmann) in satisfaction of the Statute both prior to and subsequent to the April 6, 1984, change in commission format evidenced in these writings, thus:

> MR. O'CALLAGHAN: Judge, there are more pages I'd like to have addressed.
>
> THE COURT: I have no more pages presented to me, and we are going out. (App S at 150a).

[6] Upon court review of the PTO on the first day of trial, for the first time since its submission 15 months earlier, Fairchild objected to the use of ***PTO exhibit numbers***. The court directed that none of Merex's exhibits as numbered - i.e., particularly, evidencing Fairchild's unauthorized redaction/non-production - were to be used, rather, each had to be renumbered, adding that should Merex's counsel represent to the Second Circuit that the court had not granted a conference as had been requested, then: "I'll [the court will] write a letter to the Court of Appeals to hold you in contempt". (A 639, 1578-91).

4, 1984, telex to Lay in which Wahl **admitted** that the sale as of April 4, 1984 - i.e., **prior to** Merex, Jr.'s April 5, 1984, arrival in the PRC - : **already had become** "contract **directly** between FWSI/PRC... ...prices...includes only Lachmann..." (App O at 127a). The relationship had not "eroded", Merex was neither a "manufacturer nor a distributor" - there was **no requirement** for Merex to attend in the PRC at this time, nor was there evidence introduced supporting any such requirement. Simply, there was no need evidenced for Wahl's trial contended April 4, 1984, "back-up clause" (i.e., payment terms replacing the sale/resale format with a now **direct** Fairchild/PRC sale format). Rather, Fairchild was secretly and without authority in the PRC and without authority negotiating commercially; Merex, en route to the PRC, already had been "cut-out" - and Ex 83 documented it! Thereupon, erroneously, Wahl's prior (1986) deposition testimony, which had omitted all reference to any "back-up" contention, at the 1992 trial prejudicially was authorized to be "elaborated". The court denied Merex's request for a continuance and precluded development of all testimony relating to contended ITAR violations.[7]

The ability of Merex to present any rebuttal case, particularly grounded upon the Egan and Fanneron depositions and the Pricing Files was precluded upon prejudicial rulings concerning subpoena service and irrelevance, e.g., the court denied use of the Fanneron deposition grounded upon insufficiency of subpoena service, notwithstanding that service had been completed and the court had declined twice to enforce the subpoena or grant a continuance for presentation of Fanneron as a witness. (App S at 157a).[8] Rather, the court directed that there would occur a "post-trial" hearing on the "due diligence" of the Fanneron, Egan and Kraljic subpoena services. (A 1296-97). The court declined to hear Merex's timely R. 50 application, one requested prior to submission of the case to the jury for verdict. (A 1740-42, etc.)

Fairchild demanded that the court charge the jury - one

---

[7]"**ITAR**" herein refers to 28 U.S.C. 22, Code of Federal Regulations, "International Traffic In Arms", Parts 127, 130. (App K at 111a).

[8]Upon Wahl's request, mid-trial, the court conferred with Fanneron from the courtroom by telephone, but nonetheless denied enforcement of the subpoena which Fanneron admitted properly had been served upon him for trial attendance.

never informed that the court had declared it "advisory" - upon the elements of promissory estoppel and damages at 8%. The court agreed and so the jury was charged.[9] The court denied Merex's trial requests for the presenting of any exhibits to the jury, ruling that such was authorized only after the charge and then only upon jury request. Upon two (2) days of deliberation, the jury returned a General Verdict in favor of Merex. Merex moved for R. 56(g) sanctions, requesting a hearing. Fairchild represented that the court *ex parte* had directed that "there are no proceedings scheduled..." (A 697(c), (g)). Nine (9) months later, by memorandum opinion dated December 29, 1992, the court rendered a verdict for Fairchild upon the promissory estoppel claim. By judgment dated January 21, 1993, the court dismissed Merex's complaint. Merex moved for Rules 50, 52, and 59 relief. On October 29, 1993, the court denied Merex' Rules 50, 52 and 59 applications. Merex filed a petition for rehearing (*en banc*) (the "**petition *en banc***") on July 28, 1994. On September 8, 1994, the petition *en banc* was denied.

C. Statement of Facts

Fairchild had not done any business with the PRC but had entered into negotiations exclusively through Merex (and Lachmann). In mid-1982, in Germany, Merex introduced Fairchild's Neasham to the PRC Air Force, which acted through Norinco, under Zhao Fei ("**Zhao Fei**"). Merex (and Lachmann) testified that Neasham promised Merex an 8% commission upon **any** sale, notwithstanding format for completion and that from Germany, Neasham had confirmed that Fairchild's headquarters had agreed to the 8% commission upon any sale. The illusory sale/resale format was introduced on/about August 24, 1982, by

---

[9] ***In summation***, objectionably, but absent court correction, ***Fairchild argued*** that Zhao Fei did not provide for his "old close friend", Mertins, Sr., in the Fairchild/PRC sale (A 1679-80). In response, Merex observed that the PRC, as any buyer, may have had an interest in a broker's non-participation in a project. Nonetheless, there is ***absent*** any argument or reference, even remote, that "Fairchild schemed with the PRC to 'cut plaintiff out of the deal'", erroneously stated by the court. (App A at 34a). The jury's verdict was not undermined by any such argument because none was made.

Neasham upon **direction** to Merex for commencement of the sale/resale correspondence trail,[10] later - at trial - a format contended by Fairchild to contradict (indeed, replace) Fairchild's own November, 1982, Letter of Intent ("**L/Intent**"), and all subsequent export license submissions to the U.S. Government which documented from inception the consistent effort by Fairchild to conclude a direct sale, and only a direct sale, to the PRC. Mertins, Sr., testified that the PRC would want Fairchild, the manufacturer, in a direct contract.[11] This was stated in the L/Intent composed by Neasham to Zhao Fei in November, 1982. In pertinent part the ***L/Intent states: "To U.S. Gov't: The [PRC] intends to purchase from Fairchild***...LORAP cameras...." Incorrectly, the court wrote:

> [A]t *Neasham's* request, *the PRC prepared* a proposed Letter of Intent. Neasham found the PRC form unacceptable. He then prepared a new Letter of Intent which was accepted by Norinco. (App A at 8a).

---

[10]Fairchild established the sale/resale format by requesting that ***Merex seem to promote a format*** actually solicited by *Fairchild*:

> "To: Mr. Mertins...August 24, 1982
> ***Fairchild Weston [Neasham] needs telex from GGM (Merex) requesting F.W. to prepare proposal for certain customer.*** Also requesting five systems, two LORAP cameras, one MTRF.... Needs contract terms.... (***Contract between Fairchild and distributor***...F.W. asking State Dept. for advisory...[Merex] said that telex will be sent to Fairchild...tomorrow".

Merex sent the August 26, 1982, telex as the sale/resale trail requested by Fairchild commenced. The court relied upon Merex's August 26, 1982, response (App A at 4a), but erroneously omitted consideration of Fairchild's ***uncontested*** August 24, 1982, solicitation telex (App O at 119a).

[11]Fairchild's contention for ***"distributorship" is insupportable***: Fairchild conceded an absence of distributorship in all prior LORAP sales (A 1148); the parties agreed that the transaction contemplated only one sale and so the "Sale/Resale", the e.g., "**Red Book**", format prescribed - ("[T]his contract shall ***not be construed or constitute a distributorship agreement*** ...") (Ex Ap 101); likewise, the Circuit's acceptance of this contention was erroneous (App C at 44a). Merex was not to assume title to military equipment in the real sense, nor take possession; rather, sale/resale was proposed *by Fairchild* so as to conceal Fairchild's ITAR obligation for reporting two (2) commissions, one to Lachmann, the other to Merex - the economics of the transaction were unaffected.

Actually, Neasham submitted *his* hand-written L/Intent to Zhao Fei documenting a direct Fairchild/PRC sale (App O at 120a); this, then, was typewritten by the PRC and returned to Neasham. (App O at 121a). The court's incorrect characterization unfairly (as well, erroneously) provided grounds to undermine **Neasham's** otherwise abundant and certain **authority** to assure a commission to Merex upon a proposed $55M sale to a communist country of military equipment. The L/Intent was the foundation for *both* Fairchild's (i) first (i.e., 1982, Merex included) application for license to export (App O at 123a), and (ii) Fairchild's 1984 "renewal" application for (actual) export to the PRC - absent Merex - upon the Fairchild/PRC direct sale (App O at 129a, 133a). However, in order to satisfy a *Fairchild requirement* that Fairchild not document the payment of two (2) "commissions" - Lachmann, Fairchild's consultant, had a written commission agreement, Ex Ap 68,[12] - the transaction assumed an illusory "sale/resale" format from August 24, 1982 through April

---

[12]Initially, ***Lachmann's*** written "representation" agreement assured commission compensation to Lachmann upon *any* Germany/Far East sale. Subsequent to the introduction of Fairchild's sale/resale format in late 1982, Lachmann's agreement was re-written in January, 1983, to authorize a commission to Lachmann **only** upon a sale through/with Merex upon "Project Anna". Lachmann testified that in October, 1983, Fairchild unfairly compelled him to withdraw from the project, his commission reduced from 6% to 2%, nonetheless, payable upon *any* Fairchild sale to the PRC. Lay characterized these events: "This is just one of those dirty things you have to do now and then" (A 326-327). Subsequently, upon the direct Fairchild/PRC $20.3M sale, Fairchild renounced all obligation to Lachmann. In 1985, Fairchild offered Lachmann $150,000 in compensation for Lachmann's **unreimbursed** expenses incurred upon Lachmann's thirteen (13) trips to the PRC during two (2) years of dedicated service to Fairchild; however, payable only upon Lachmann's consent not to testify in this action in person or by affidavit on behalf of Merex, unless compelled by district court process. (Lachmann was/is a citizen and resident of Germany, at/near Munich, Germany). At trial, seven (7) years later, in April, 1992, subsequent to dismissal of all Lachmann claims excepting **quantum meruit** - and absent any PTO enforcement to Lachmann's tortious interference claims - virtually indigent, unemployed since 1983 other than as a "consultant" at nominal income, upon discussion with the court and counsel, Lachmann agreed to accept the same amount as had been offered in 1985. Notably, Lachmann's withdrawal from the trial at that time removed "advisory jury" consideration concerning dismissal of his **quantum meruit** claim upon his written agreement.

6, 1984, assuming a direct Fairchild/PRC sale format on April 6, 1984.[13]

Fairchild did not commence production of "writings" critical to resolution of the Sum J. Motion until after submission of the motion, i.e., subsequent only to (i) a redacted, insufficient, post-April, 1986, production and (ii) the October, 1988, denial of Fairchild's Sum J. Motion, without opinion, i.e., *2½ years later*. Thus, Fairchild in November, 1988, commenced production in non-redacted form, then, notably in six (6) separate productions and, then, absent agreed "Bates" numbers. This resulted in Merex's adoption of "**S**", "**A**" and date of production notations.[14] (A 205-07). The secreted documents indicate:

Number/Date		***Relevance***
(i)	20085-A to 20066-A 8/22/83-9/13/83	Fairchild records "commissions" payable to Merex and Lachmann, e.g., "Combined commission 15%"
(ii)	127-A (undated).	"Merex gets... *or 8% commission"* (A 384).
(iii)	20043-A, 4/4/84; 119-S (undated)	Price at $26,278M; Merex and and Lachmann at 6%; meeting w/Pighi, Egan and Fanneron; guidelines to [Lay]
(iv)	125-S Letter of Credit particulars, 4/6/84	"The customer [PRC] has our product...," Fairchild is negotiating commercially w/PRC (A 394).
(v)	2293, **4/6/84**	"Renewal" License (for shipment to PRC's Poly) for

---

[13]ITAR required that all commissions be documented. ITAR Reg. Part 130 (App K at 114).

[14]"*S*" indicates any production only supplemental to the date of Sum J. Motion denial, i.e., secreted documents produced in *any* form only in/after November, 1988. "*A*" indicates documents produced in redacted form in April, 1986, and in unredacted form only in/after November, 1988.

	"unshipped balance" of LORAP equipment identified on Merex's 12/82 License (#MC185078) (A435).
(vi) 120-S, 4/9/84	6% commission, as portion of 52% "Fee/Profit"; price at $23,632M. [Fairchild contended that after *4/6/84*, there no longer existed any "commission" obligation to Merex].
(vii) 121-S (undated).	Price at $23,632M. Egan read his handwriting: "***Commission - cut out***".
(viii) 122-123-S, 4/9-10/84; 20041/42-A,	Commission at 6%. [Fairchild contended that Merex "withdrew" after 4/6/84.] (A 397-400).
(ix) 239-S, 4/12/84	As Lay directly negotiated w/PRC, Wahl provided a change to the "payment clause", i.e., a change in value from $26,278M to $21,079M - competition and "cutting out" commissions had reduced the price.
(x) 126-S, 4/24/84	Lay's "Negotiation Trail" records a reduction of price to $21,079M including identity of ***competition***, "***CAI***" ("***Chicago Aerial***"). (A 402).
(xi) 20038-A, 4/24/[84]	Lay testified that in Mid-April, 1984, Fairchild *abandoned* the PRC: returned to Fairchild "tail between my legs", the sales effort concluded, **the sale "never to happen"**. *Nonetheless, Merex/ Lachmann commission at 6%;" assume 9.1.84 start....maintain 31% fee*".
(xii) 20033-A, 5/17/84	Sales price at $21,079M w/profit ("fee") maintained at 31%; commissions at 2% and 6%. (A 407).

(xiii) 0084, 5/22/[84]	Sales price at $21,079M with a 2% commission - payable in part to Merex/ Lachmann (A 408).
(xiv) 139-S to 151-S, 7/84	Fairchild's proposed agreement with **Poly**, a PRC entity which *de facto replaced Lachmann*, includes a 3½ % "commission" to Poly. (A 413-20).
(xv) 129-S, 7/6/84	On *April 11, 1984*, Pighi had set pricing for the sale. (A 409, 371-72).
(xvi) 20000-A, 8/24/84	Sales Price at $21,079M; "fee" at 35%. (A411).
(xvii) 136-S, 9/12/[84]	"Chinese sending out feelers to get evaluation what price should be. CAI not standing-by." (A 412).
(xviii)152-S, 154-S, 9/25/84	MBB, a German sub-contractor, confirms to Lay that Project's *same* "terms and conditions" continue through September, 1984. (A 432-33).
(xix) 30016-18, 10/12/84	(i) Fairchild's Renewal (i.e., direct to PRC) License and (prior) **identical** License to Merex (#MC185078) **both** grounded upon Neasham's L/Intent: "Issuance of the subject license was predicated on a *letter of intent* received from [the PRC's] NORINCO....**From the inception date of this license [i.e.,12/10/82] Fairchild has been negotiating with [PRC] to conclude a final contract**. On August 27, 1984, Fairchild was successful in negotiating such contract..."; (ii) a $304.5K commission to Poly; (iii) "No other payments are to be

	authorized or reported...." [nonetheless, internally, Fairchild records $270K payable to Lee]. (A 422. 374-76).[15]
(xx) 001-A, 10/22/84	Fairchild's "Program Budget Release" signed by Egan w/notation "Price $20.3M and $614K commissions" payable to: Poly (3½ % or $304.5K), *Lachmann ($40K)*, and Lee [Merex's former Hong Kong translator] ($270K)[16]. (A 422-23, 374-76).
(xxi)30037-30040, 2/27/85	"Renewal License" replaced License to Merex, i.e., authority to transfer the "unshipped balance" of the Merex License "identical commodity". (A 342, 425-28).
(xxii)283-S, 1/86	Fee/Profit 19% (A 429).

* * * * *

Solely, through 1986 deposition, Neasham testified at the April, 1992, trial that he was a 19-year Fairchild representative,

---

[15]Together with Lay in 1986, upon Fairchild's Sum J. Motion, Redanz, Kraljic's replacement as Contract Administrator for Project Anna, testified that *no fees* were paid to Lee, *nor* were ***ITAR*** required reports presented to the U.S. Government: "No commissions to anyone" and "No reports" - at trial, the court precluded this testimony which evidenced Fairchild's avoidance of reporting the payment of *two* commissions, i.e., one to Lee and a second to Poly, notwithstanding ITAR. Further, the evidence contradicted Fairchild's Sum J. Motion contentions: substantial commissions were payable to Lee and Poly as evidenced in Fairchild writings, indeed, as authenticated by Lay and executed by Redanz in a report to the U.S. Government!

[16]The court ruled that this payment to Lee had "nothing to do with the case", precluding all development of evidence relating to Merex's contended rationale for Fairchild's insistence upon the illusory sale/resale format, as well, contention for ***ITAR*** violations. (A 1466-96).

one of two Fairchild Directors of Operations. Neasham contended that no commissions were paid to anyone and that his handwritten L/Intent proposed a PRC purchase from Merex! (App O at 120a). Nonetheless, Lachmann ***and Lay*** testified that ***Neasham's authority*** was evidenced in Neasham's preparation and obtaining of both the draft L/Intent and the typewritten, PRC-Government-signed, L/Intent.

Neasham and Lay conceded that it would require ***at least two (2) years for Fairchild to conclude a LORAP sale***. During 1982-1984, Merex (and Lachmann) completed thirteen (13) trips to the PRC - some lasting for weeks - to facilitate the sale, incurring substantial expenses. Indisputably, "**Both sides were to be present during any negotiations [with the PRC]**". (App A at 11a). Merex testified that, nonetheless, in *breach* of commission obligations, *absent notice,* while Mertins, Sr., and Jr., were in Germany (so the court found, **Id.**) and negotiations *unscheduled* in/with the PRC, commencing at least during the period February-April, 1984 - with a large contingent of personnel, i.e., not just with Lay - Fairchild entered the PRC and interfered with Merex's ability to earn commissions by directly negotiating without authority with Zhao Fei.[17] Clearly erroneously, the court *found* that "Lay...was in China discussing the *technical* aspects of the proposal (App A at 12a). However, Ex 83, the Pricing Files, indeed, the ***court's Opinion*** confirm Lay's (and Wahl's) February-April 6, 1984, *unauthorized, i.e.,* ***commercial*** negotiations with the PRC, e.g.: "*Zhao Fei spoke to me directly on the commercial part....*" (March 24, 1982) (App A at 34a), indeed, upon the

---

[17]Lay's testimony relating to **Bucholz** was inadmissible; the court's reliance, clear error. (App A at 13a, 35a). There was *no* establishment of the nature of Bucholz's participation in the project excepting as - **admitted by Lay** - a mere Merex employee *already* in the PRC on *unrelated* assignments, who had **not** been sent by G. Mertins, as erroneously found by the court. (App A at 34a). F.R.Evid. 801(d)(2)(D), *see Litton Systems, Inc. v. American Tel. & Tel. Co.*, 700 F.2d 785 (2nd Cir. 1983). Lay admitted that he had never before met Bucholz, did not know him:

> "[Bucholz] let me know he was ***not on this project....***" (A 1379); "[Bucholz] did not participate in our meetings...with the Chinese...he was there on *other business*, and that was *not* his mission.... (A 1399-1400).

authority, i.e., "*Guidelines*" of Pighi, see, *"negotiation trail"*: "$25M on April 5, 1982..."). (App Q at 144a). The court continued to confirm Fairchild's (at least) March 24-April 6, 1984, breach (App A at 12a,13a):

> ***March 27, 1984***: "[S]uccessfully completed remaining technical matters...***we will start commercial discussions day after tomorrow. We have an all-court press on to let's sign Anna. No Merex***...."
>
> ***April 1, 1984***: "***[T]oday I started discussions with sponsor on commercial portion of Anna contract***...."[18]

Mertins, Jr., testified that there were *not scheduled* any February-April, 1984, meetings in the PRC, that Merex had not been advised of Fairchild's written "invite" into the PRC, that Merex did not know the reason for Fairchild's attendance in the PRC at such time and that upon Mertins, Jr.'s, prompt departure from Germany and arrival in the PRC at Lay's request[19], Lay promised Merex an 8% commission on April 6, 1984, upon any

---

[18]Thereafter, this telex includes ***clearly erroneous hearsay*** erroneously relied upon by the court in which Fairchild solicited Merex to travel to the PRC so that Fairchild overtly would not appear to have negotiated commercially ***absent Merex's presence*** - indisputably what Fairchild was doing; Merex's prompt, compliance - ***instead of suit*** - facilitated these Fairchild (telex documented, nonetheless) covert commercial negotiations.

[19]In clear error, the court found: "***For reasons never explained, G. Mertins did not go to the PRC as he agreed to do***...." (App A at 34a). Rather, the court ***precluded*** all testimony from Mertins, Sr., relating to the reasons for Mertins, Sr.'s, inability to attend in the PRC in March-April, 1984 - for negotiations which nonetheless were ***unscheduled*** and by Fairchild in the PRC, ***alone***, ***prohibited*** - grounded upon illness. (App R at 148a). There was ***not*** evidenced any such "agree[ment] to go", nor that any negotiations were scheduled. More, there was evidenced, the absence of all written evidence of any legitimacy to Fairchild's unannounced attendance in the PRC, ***alone***, at that time. Subsequently, the court attempted prejudicially to preclude Mertins, Jr. from testifying to the explanatory testimony of illness of his father. Mertins, Sr., died on March 19, 1993. (App R at 149a).

direct Fairchild/PRC sale. (Ex Ap 161).[20] Lay testified that by mid-April, 1984, however, *the PRC represented* that funds were unavailable; in consequence, Lay testified that Fairchild abandoned the project:

> "I [Lay] returned...very disappointed, and gave strong indication to...Pighi that *this will never happen* - that we've been investing money not too well." (A 1161-63, 1416).

However, the Pricing Files contradicted this: rather, on/about April 15, 1982, ***already Lay had reached agreement with the PRC***:

> "4/24/84 CF [C. Fanneron]
> Chris ***Lay says*** that his ***agreement with China*** is for 21,078K and ***is valid*** for a period of 60 days (to approximately June 15, 1984). *The negotiation trail follows...* (App Q at 144a).

One month later, in May, 1984, Lay presented a "draft" contract to Zhao Fei - one virtually identical to the Fairchild-Merex-PRC draft "Red Book" contract - with instruction: "*All that is missing are signatures to make it effective.*" (App O at 130a). By July, 1984, Lay contended, PRC funds were available for a "new program" (A 1143); "we got a *message* from Zhao Fei inviting us to come in-country..." (A 1162-63). In July/August, 1984, Fairchild returned to the PRC and in/about *six (6) weeks concluded a direct sale* for $20.3M upon an August 27,-September, 1984, contract executed by Lay, Neasham and Zhao Fei.[21] (App O at 131a). Lay contended[22] that the April, 1984,

---

[20]Clearly erroneously, the court ruled that there existed a ***non-existent, commencement of trial exclusionary ruling relating to Mertins, Jr.*** Notably, the court erroneously discredited all of Mertins, Jr.'s, credible, ***determinative testimony***. (App A at 15a).

[21]In the not surprising - nonetheless, uniquely beneficial to Fairchild - ***absence of any witness from the PRC*** at this trial, clearly erroneously, the Court authorized Lay to contend that ***the PRC represented*** that there were insufficient

collapse of a nearly two (2) year sales effort to a communist country of a $53.5M sale of military equipment and Fairchild's "***abandonment***" because the sale "would never happen"...investing money "not too well," was *never documented*.[23] (A 1460-61).

---

funds for an April, 1984, sale, that Zhao Fei was "upset", and that the PRC could not: "[h]andle clause 22 [payment clause]... Sponsor ***[Zhao Fei] has told me [Lay] he wants to get into commercial and finish it this trip***...."

> Mr. O'Callaghan: [I]t's hearsay.... The Chinese aren't here....
>
> THE COURT: But he is here. *It's only hearsay if he's testifying that somebody told him what the Chinese said*. ...[t]he Chinese told him that they could not handle it [clause 22]. This is his perception of a business conference.... (A 1372-93, etc.). (Emphasis added).

Similarly, clearly erroneous was the court's allowance for Lay's hearsay testimony that, e.g., the *PRC* "required a senior Merex person to be present" and "*Zhao Fei*...wanted to deal with Mr. G. Mertins". (App A at 11a-13a).

[22]Lay's cross-examination was interrupted by the court (A 1425-91), unfairly, precluding all evidence relating to "pricing", "writings", the use of "L/C's" (A 1445-64). However, notwithstanding format, *all* payment clauses proposed, i.e., "clause(s) 22", evidence the use of ***letters of credit*** ("L/C's"). Fairchild's contention for "misgivings" about doing business with the PRC and doubts of payment are *not* credible - the court's and Circuit's acceptance (App A at 7a, App C at 44a) contrary to the weight of the evidence - in context of the intended and *actual* use of L/C's, in context of the relationship between Fairchild, a major defense contractor, and the PRC military, more, in consideration of the actual direct contract accomplished in "six weeks" and in context of events at the *highest* level U.S. executive branch *on Fairchild's behalf* to approve the sale, see, e.g., Fairchild efforts to accomplish the sale, including exhortation to the PRC on behalf of Fairchild by then Secretary of State, George P. Schultz, notwithstanding "DOD" (Department of Defense) initial (1982) objection. Simply, there was no need for the sale/resale format except for Fairchild's ITAR concerns. (App O at 126a).

[23]Fairchild failed to produce in discovery or introduce at trial, three (3) ***written memoranda*** which Lay said existed: (i) written evidence of the "invite" into the PRC in March, 1984, for negotiations to "***[g]et into commercial and finish it this trip***"; (ii) written evidence to Merex that Fairchild so arrived in the PRC with the consent of Merex and (iii) written evidence of a second "invitation" from Zhao Fei (mid-1984) for Fairchild's return to the PRC for commencement of "new" negotiations, which in six (6) weeks resulted in the direct Fairchild/PRC contract. (A 1143, etc.). Nonetheless, the court in clearly erroneous findings,

REASONS FOR GRANTING THE WRIT

A. Jury Was Not Advisory: General Verdict Should Be Reinstated

In pertinent part FRCP Rule 39(c) states:

> **Advisory Jury *and* Trial by Consent**
>
> In all *actions not triable of right* by a jury the court...may try any issue with an advisory jury ***or***,...the court, with...consent..., may order a trial...**same effect** as if trial by jury...of right. * * *

Indisputably, a jury was impaneled for trial of this "*action*", one which included contract and other Seventh Amendment right to jury trial. Thus, "advisory" jury discretion should *not* apply in this "action". Indisputably, the Pre-Trial Order's direction, upon consent for trial of all issues by jury - effective for 15 months prior to impaneling - **ordered** "a trial with a jury whose verdict had the **same effect** as... matter of right." Thus, Rule 16(e) prescribed a jury trial of all issues: "[Final Pre-Trial Order] *shall* be modified *only* to prevent manifest injustice ..." Here, manifest injustice and "express statutory mandate", Rule 16(e) and Rule 39(c) (Trial By Consent), should validate the jury verdict.

The Circuit's statements that "'the litigants...cannot impose.. a [jury] trial on an unwilling court...' and, "not be clear until well into the trial whether an issue is equitable or legal", (App C at 55a) here, are inaccurate. *All* knew since the Sum J. Motion, 6 years earlier, the Rule 37 Motion, 4 years earlier, the PTO, jury instructions and trial memoranda, all 15 months earlier, that promissory estoppel and tortious interference claims were

---

precluding "unconscionability", found that Mertins, Sr., "did not go...absence...a failure to negotiate in good faith" (App A at 35a-36a), notwithstanding the absence of Fairchild proof for any authority for Fairchild's excursion ***alone*** to the PRC "to finish it this trip" - notably, a conclusive admission that Fairchild, ***absent Merex***, intended to conduct (and did conduct) ***unauthorized commercial negotiations***, since Merex was not there, was "[I]n January, February, and March of 1984,...in Germany". (App A at 11a).

consented and ordered to be presented to a jury. The parties did *not impose such jury trial upon the court, - the court had "So ordered" such trial. Under the Seventh Amendment, such trial by consent had the "same effect" as jury trial of right and should not be authorized to be rescinded mid-trial. In Thompson v. Parkes*, 963 F.2d 885, at 888 (6th Cir. 1992), upon virtually identical facts, the Sixth Circuit held:

> [T]he parties agreed and the court ordered...that the matter be tried as a jury case. *No mention* was made of an *advisory jury during trial preparation*. In such a case, *whether or not* the issues were *equitable* in nature, the *verdict* of the jury *must be treated as if the right had existed* and it is beyond the power of the district court to set the verdict aside on the theory it was advisory. (Emphasis added).[24]

These decisions do not appear - even remotely - to have been determined by the "timing" of advisory jury "designation", the grounds cited by the Second Circuit (App C at 54a). Rather,

---

[24]*Thompson* is in accord with virtually identical Rule 39(c) (**Advisory Jury**) precedent in every Circuit - now, excepting the Second - which has considered this issue, *viz.*, the Sixth, Tenth, Third and Ninth Circuits. Thus,

> [T]he...court erred in withdrawing the case from the jury.... There are significant tactical differences between presenting...a case to a jury as opposed to a judge; to convert a trial...in the middle of the proceeding is to interfere with counsels' presentation...and, quite possibly, to prejudice one side or the other.... *Hildebrand v. Bd of Trustees of Mich. S. Univ.*, 607 F.2d 705 (6th Cir. 1979);

> [W]here...both [sides] agreed...tried by a jury, the court approved the stipulation, entered its order for jury trial and set the case for trial on the jury docket, the court abused its discretion, if discretion it had..., in subsequently denying a jury trial on the court's own motion. *AMF Tuboscope, Inc. v. Cunningham*, 352 F.2d 150 (10th Cir. 1965).

Accord Bereda v. Pickering Creek Indus. Park, Inc., 865 F.2d 49 (3d Cir. 1989) (upon advisory jury application: such announcement no later than commencement of jury selection process); *see also Pradier v. Elespuru*, 641 F.2d 808, 811 (9th Cir. 1981).

something fundamental - the right to a fair trial - underlies these decisions. Likewise, until this case, the Second Circuit *had ruled* that a pleading endorsement of a claim for jury trial resulted in a binding jury verdict concerning an otherwise equitable (indemnity) claim.[25] Likewise, Merex did not withdraw its "claim for jury trial," likewise, "was therefore entitled to such trial," and likewise was "*what...[it] got.*" **Seven (7) years** after uncontested jury demand, **fifteen (15) months** into jury trial preparation upon the PTO "So ordered" **consent** to jury trial of all issues and half-jury trial presentation, under Rule 16(e), the court should be held to be without power to declare the jury "advisory". The "action" - one including a contract claim - was triable of right; "advisory jury" discretion should not apply. Under Rule 16(e) and *DeGioia*, grounded upon fundamental prejudice, the verdict should be sustained.

B. The Verdict Upon Promissory Estoppel Was Valid

The principle that promissory estoppel is a jury issue, notwithstanding the Statute - until now - was established in the Second Circuit. *Esquire Radio & Electronics, Inc. v. Montgomery Ward & Co., Inc.*, 804 F.2d 787, at 793 (2nd Cir. 1986): "We hold that [the contract claims] were properly submitted ***to the jury***

---

[25]Merex's reliance - to the Circuit - upon ***DeGioia v. United States Lines Company***, 304 F.2d 421 (2nd Cir. 1962) was well grounded:

> The judge early determined that he would try the issue of indemnity separately from DeGioia's original claim; and he told the parties that he would accept an advisory verdict on that issue, ***since a jury trial was not required.*** So after the jury had found liability to DeGioia by the ... [shipowner, defendant] the trial of the indemnity issue proceeded before the jury. Only after the verdict against the stevedores was rendered did the court indicate to the jury that the verdict would be considered advisory. Subsequently it was discovered that American Stevedores had *endorsed a claim for jury trial* on its answer, as provided in F.R. 38(b). ***The court then reversed its position and accepted the jury's determination as binding.....In his last ruling the judge was quite clearly correct.*** American Stevedores had never withdrawn its claim for jury trial and was *therefore entitled to such trial.* F.R. 38(d), 39(a). That is what it got.... (Emphasis added.).

on a promissory estoppel theory".[26] Merex expended substantial time, money and effort for nearly two years with *no* financial advantage. The Circuit is incorrect (App C at 48a): "alleged commission agreement...supported *by adequate* consideration" the commission agreement was *not* supported by *any* consideration - except Fairchild's promise of an 8% commission, upon which for two (2) years Merex performed in reliance. Fairchild, not Merex, raised the Statute. Unconscionability must be a jury issue - otherwise, in any Statute case, contrary to *Esquire Radio* - promissory estoppel would *not* be for jury determination. Here, the jury was able to conclude that there had been unconscionability: upon Fairchild's (unauthorized) arrival in the PRC in February/March, 1984, Fairchild had intended before Merex's April 5, 1984, arrival that the sale would exclude Merex: [April 4, 1984] "[c]ontract directly between FWSI/PRC..." the "prices...[i]ncludes only Lachmann"; thereafter, Fairchild concluded the sales effort -"[a]ll that is missing are signatures to make it effective" (May, 1984) - until the August 27 - September,

---

[26]As addressed in *Marilyn Miglin, Inc. v. Gottex Industries, Inc.*, 790 F.Supp. 1245, at 1252-53 (S.D.N.Y. 1992):

> ...[A]rgues that the [Statute]...should bar...[the] promissory estoppel claim. .... [I]n...[*Esquire Radio*, *supra*, 804 F.2d at 790], *the Second Circuit held that a claim based on...promissory estoppel was properly submitted to the jury*.... The appellant contended that any obligation that it had was unenforceable under the...[Statute]. Nevertheless the court reasoned that because... [here, Fairchild] had reneged on a promise on which the appellee had reasonably relied, the appellant was *equitably estopped from raising the...[Statute]. Id.* at 794....As the Second Circuit has stated, a party may
>
> > withdraw himself from the policy and defense of the...[statute]...by inducing or permitting...another to do acts, ...in reliance upon the agreement, to such an extent and so substantial in quality as to irremediably alter his situation and make the interposition of the statute against performance a fraud. [Emphasis in original.] [Citing *Philo Smith & Co. v. USLIFE Corp.*, 554 F.2d 34, at 36 (2d Cir.1977)].

Philo Smith **(decided subsequent to a *jury trial* upon promissory estoppel involved a finder's fee for the sale of a business, a claim clearly within the Statute; Merex's claim concerns a commission upon a single sale of personalty, a transaction outside the Statute.**

1984, formal contract signing. The jury provided a binding verdict.

C. The PTO "[C]ontrolled...modified only to prevent manifest injustice", FRCP Rule 16(e); Preclusion of Tortious Interference Claims Was Error

As the Rule 16(e) filed PTO "control[ed]... modified only to prevent manifest injustice", it was unnecessary for Merex to "argue" that Fairchild "consented to Merex's demand for a jury trial...". (App. C at 52a). *This Court* so has held that a PTO supplements the pleadings and governs the subsequent course of the trial. *United States v. Hougham*, 364 U.S. 310, 81 S.Ct. 13, 5 L.Ed.2d 8 (1960). Rather, Rule 16(e) required that there be a trial before a jury and impartial court upon the tortious interference claims as had been identified in the PTO. In context of Rule 16 effect, a jury trial of the tortious interference claims was appropriate, indeed, was grounded upon assurances of "*same effect*" as Seventh Amendment right. Rule 39(c). ("**Trial By Consent**"). In the Second Circuit, the tortious interference claims **were required** to have been presented to the jury.[27]

Here, the tortious interference claims not only were addressed in the PTO, but also permeated the action, as well, *jury* determination upon *consent* and PTO filing concerning the promissory estoppel claims - indeed, were addressed in the Sum J. Motion (1986), the Rule 37 Motion (1988), the Draft PTO (1990) and the Final PTO (1991). In truth, contrary to the Circuit's characterization of absence of "demonstrable prejudice" and

---

[27]As explained in *Lamborn v. Dittmer*, 873 F.2d 522, at 527 (2nd Cir. 1989):

> ***[R]ule 16*** **was not intended to function as an inflexible straightjacket on the conduct of litigation.... [I]t was intended to..., most importantly, *minimize prejudicial surprise*. (Emphasis added).**

In *Lamborn*, there was a claim of "prejudice" grounded upon omission in the *PTO* of fraud allegations; however, such allegations were presented in a motion made two (2) years earlier. *Lamborn* held: "If the pre-trial order did not put Dittmer on notice of the ...[claim], the...motion surely did... Dittmer had...two years to prepare his defense."

"[s]ometimes not...clear until well into the trial whether an issue is equitable or legal" (App B at 50a), the tortious interference and promissory estoppel claims clearly were understood by the parties **and the court** as jury triable **years** before the trial. Prejudicially, it was exclusively upon such PTO ordered jury trial claims that Merex prepared for 15 months prior to such anticipated jury trial. It was Merex which sustained demonstrable "prejudicial surprise" as the "complaining party" because these claims were not presented to the jury.

D. Fairchild's Rule 50 Motion Should Have Been Denied

Fairchild's insistence upon "sale/resale" **precluded** the Statute.[28] Further, the one-time sale of two (2) LORAP cameras should *not* constitute a "business opportunity". The Pricing Files *precluded* application of the Statute; **this** determination was for the jury -- "parol evidence" was *not* the issue. (App A at 20a-23a).[29] The Circuit conceded that Fairchild "refused to pay Merex for its prior services..." (App C at 44a). Thus, recovery on a *quantum meruit* basis was authorized. *Marcella v. ARP Films, Inc.*, 778 F.2d 112, 117 (2nd Cir. 1985); *see also Morris Cohon & Company v. Russel*, 23 N.Y. 2d 569, 297 N.Y.S. 2d 947 (Ct. App. 1969). More, Fairchild had "knowledge of special

---

[28]*See, Sussex Leasing v. U.S. West Financial Services*, 877 F.2d 200, 203 (2nd Cir. 1989) ("[Statute] applicable to ... genuine brokerage ... 'A broker assumes no obligation and runs no risks'" (Citations omitted).).

[29]*See Crabtree v. Elizabeth Arden Sales Corp.*, 305 N.Y. 48 (Ct. App. 1953); *Paper Corp. of the United States v. Schoeller Tech. Papers*, 807 F.Supp. 337, 346 (S.D.N.Y. 1992). In *Ohanian v. Avis Rent A Car System, Inc.*, 779 F.2d 101 (2nd Cir.1985), the Second Circuit observed:

> [T]he [S]tatute]...is an *anachronism today*. [F]ar from serving as a barrier to fraud - in the case of a *genuinely aggrieved plaintiff* barred from enforcing an oral contract - the statute may actually shield fraud." (Emphasis added.) 779 F.2d at 106.

circumstances" producing benefit-of-bargain damages.[30]

E. New Trial

Merex presented (i) six (6) attempts by a process server to serve Egan with a trial subpoena, (ii) two (2) attempts to serve Kraljic and (iii) **evidence of admitted subpoena service upon Fanneron**. Nonetheless, the ability to present any case grounded upon these depositions and the Pricing Files unfairly was precluded. Upon *Wahl's* presentation mid-trial by telephone from the courtroom of Fanneron and Kraljic,[31] ***the court spoke with both witnesses but declined to require enforcement of subpoenas*** for their attendance, ruling that these depositions could not be used grounded upon failure of subpoena service.[32] The court denied

---

[30]*See, Arcadian Phosphates, Inc. v. Arcadian Corp.*, 884 F.2d 69 (2nd Cir. 1989), quoting *Nimrod Mktg. (Overseas) Ltd. v. Texas Energy Inv. Corp.*, 769 F.2d 1076, 1080 (5th Cir. 1985). Merex can (and did) "rationally calculate the ***benefit-of-the-bargain***." *Id.* at 74 n2. The benefit was at 8% for Merex, 6% for Lachmann. "But-for" Fairchild's "failure to follow through" (*Id.*) on the sale/resale promise - or to compensate Merex at 8% upon the April, 1984, Lay promise, or upon *quantum meruit* for two (2) years of services - Merex (and Lachmann) would have received the agreed commissions. More, Fairchild's "bad faith, indeed, *every* "suggestion of fraud," supports benefit-of-the-bargain damages. *Cf. Arcadian Phosphates*, 884 F.2d at 73, reference to *Palandjian v. Pahlavi*, 614 F.Supp. 1569, 1581-82 n 1 (D. Mass. 1985), *appeal denied*, 782 F.2d 313 (1st Cir. 1986) (damages limited to restitution, *inter alia*, because circumstances "without any suggestion of fraud"). The jury so *calculated* upon the General Verdict as so instructed by the court and as so argued by counsel throughout the trial and in lengthy closing arguments.

[31]Notwithstanding presentation of two (2) affidavits of unsuccessful subpoena service, the court precluded use of the ***Kraljic*** deposition. (A 1170-1203, etc.). Kraljic, an 18-year Fairchild employee, was the first witness to identify Fairchild's Pricing Files. (A 330-32, etc.).

[32]The court's allowance at trial for Fairchild's presentation of ***Neasham by 1986 deposition*** was erroneous. FRCP Rule 32(b). (A 318-22, etc.). Neasham's unavailability was grounded solely upon the representation of Wahl. The court erred both in (i) failure to require Neasham to testify in person on the credibility of his authority, *see Loinaz v. EG&G, Inc.*, 910 F.2d 1 (1st Cir. 1990), and (ii) the insufficiency (more, self-interest) of Fairchild's showing of unavailability. *Carey v. Bahama Cruise Lines*, 864 F.2d 201, 204 (1st Cir. 1988) (procured

a trial continuance for attendance of these witnesses, necessitating an unfair and premature close to Merex's case. (A 1394-98).

Prior to Fairchild's Rule 50 motion, and before the jury, the court admitted into evidence inflammatory matters, e.g., reference to "disposing of Chinese old weapons" in context of Merex's (1970's) contacts with "**Sadam Hussein**" and denied Merex's motion "*In Limine*" and motion for a ***mistrial*** grounded upon these circumstances. Similarly, unfairly, the court ruled and/or characterized the evidence in a manner supporting the "sale/resale" defense, e.g., by precluding further testimony from Merex subsequent to the *court's* elicited limited direct testimony. (A 912-13, etc.). Also, the court limited Merex's (and Lachmann's) direct testimony, particularly to "yes" or "no" responses, meanwhile, unfairly authorized elaboration by Fairchild witnesses, including elaboration upon cross and otherwise precluded Merex's effective cross-examination. (A 901-07, etc.). At a side-bar conference - in fact, before the center of the bench and audible to the jury without amplification - the court contended prejudicial inconsistency between Merex's testimony and Merex's exhibits. (T. 626-28, etc.). The court declared "rulings" concerning events which earlier had *not* occurred, e.g., ***non-existent*** early-trial rulings precluding the tortious interference claims, and, as well, sought to interfere with the attorney-client privilege (A 1045-48,etc.).

F. Rules 37 and 56(g) Relief Should Have Been Granted

It defies credibility that Fairchild, a large subsidiary of a very large international parent (Schlumberger, then Loral), "could not locate" its "central file" for a $20M - $55M sale of military equipment to a communist country, a file maintained by Egan,

---

absence). Similarly, prejudicially, Merex's use of the Egan (second) deposition - viz., the transcript containing Egan's "cut-out commission" admission - was precluded upon ***Wahl's courtroom representations***, as with Fanneron and Kraljic, that Wahl, representing Fairchild in a multi-million dollar commission case, notwithstanding the failure on six (6) recent occasions by a commercial process server to locate Egan for service of trial subpoena - had located Egan at his residence by telephone. (App S at 153a).

Fairchild's Controller and Fanneron, his assistant.[33] Fairchild's contention that it was an *"oversight" not to produce* the *"Commission Cut-out"* memorandum (App I at 95a), until after November, 1988, should not provide sanctuary.

CONCLUSION

Fairchild's contention that "[a]lleged errors...*not* subject to review", etc., because jury *declared* "advisory" (F'child "Merex Appeal" Br., 41) upon the record in this dispute epitomizes every reason to uphold the rationale of FRCP *Rule 16(e)* and *DeGioia*, a rationale recently justified in *Thompson*, *Bereda*, and *Hildebrand*. Upon **all** PTO included claims, Merex was entitled to a jury trial. The PTO and Rule 39(c) **Trial By Consent** validated the jury verdict which mid-trial should not have been declared "advisory". Merex remains entitled to a jury trial upon the PTO consented to and "So Ordered" tortious interference claims. For these reasons, the petition for a writ of certiorari should be granted.

DATED
New York, New York
November 21, 1994

Respectfully submitted,

DANIEL J. O'CALLAGHAN, ESQ.
Attorney for Petitioner
MEREX A.G.
17 Battery Place
New York, New York 10004
(212) 222-4200

---

[33]**THE COURT: Mr. Klein, produce the entire record unredacted. ....*[Y]ou have no right under Rule 26 to unilaterally redact records ....that is a Rule 37 order*...only question I have,...is *why didn't you obey the order*.... I don't care about what you expressed....You serve the records with an order of confidentiality... *[Y]ou don't withhold on your own*. (A 189-91). (App H at 76a-77a).**